87-42

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

DONALD JOSEPH CLIFT, On Behalf of Himself, and all Others Similarly Situated,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL & IMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Are some federal circuit courts of appeals creating an expanding conflict of opinions with their general application of a narrow time limitation developed by this court for a specific type of labor law suit?

2. Does the general application of this time limitation discriminate by denying labor union members civil rights and democratic processes guaranteed by federal labor law and the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Donald Joseph Clift, Jesse O'Neil Hatcher, Stanley Boyd Wilson, Jr. and Donald W. Romaine, individuals, and the class denied certification by the District Court on the 9th day of April, 1985, consisting of three hundred fifty (350) union employees who were on lay off from the International Harvester Plant in Indianapolis on May 2, 1982.

The respondents before this court are International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); Region 3, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); Local 98, United Automobile Aerospace & Agricultural Implement Workers of America (UAW); and International Harvester Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Donald Joseph Clift, and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceedings on May 6, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported and is reprinted in the appendix hereto, p. A-2, infra. The judgment of the United States District Court for the Southern District of Indiana (Steckler, D.J.) was not reported by direction of the district judge. It is reprinted in the appendix hereto, p. A-23, infra.

JURISDICTION

Petitioners invoked district court jurisdiction under the Labor-Management Reporting & Disclosure Act of 1959 (LMRDA) 29 U.S.C. Secs. 411 and 412 and the Labor Management Relations Act of 1947 (LMRA) 29 U.S.C. Sec. 185, and brought this action in the Southern District of Indiana. On April 9, 1985, the District Court granted respondents' motions for summary judgment, in effect dismissing petitioners' case. See p. A-17, infra.

Upon petitioners' appeal, the Seventh Circuit, on May 6, 1987, entered a judgment and an opinion affirming the Southern District's order that petitioners' complaints be dismissed having found petitioners' claims to be time-barred by Sec. 10(b) of the National Labor Relations Act (NLRA). No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals of all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be heard in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295.

STATEMENT OF THE CASE

This appeal requires an examination of the meaning and application of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), Title I, Secs. 101 and 102, 29 U.S.C. Secs. 411 and 412; the Labor Management Relations Act of 1947 (LMRA), Sec. 301, 29 U.S.C. Sec. 185; and the National Labor Relations Act (NLRA), Sec. 10(b), 29 U.S.C. Sec. 160(b).

The LMRDA Title I is the "Bill of Rights of Members of Labor Organizations". It regulates the internal affairs of unions and union members. Section 101 provides equal rights and privileges in such matters as freedom of speech, freedom of assembly and voting rights. Section 102 permits a union member to bring a violation of his civil rights to Federal Court.

The LMRA, Sec. 301, provides an avenue for an employee to sue "both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164 (1983) (Citations omitted). "Such a suit, as a formal matter, comprises two courses of action. The suit against the employer rests on Section 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is for breach of the union's duty of fair representation which is implied under the scheme of the National Labor Relations Act." Id. This action is known as a typical hybrid section 301/fair representation claim.

The NLRA Sec. 10(b) establishes a six-month time limitation for the filing of a charge of unfair labor practices. This appeal turns on the application of the Sec. 10(b) time limitation to the petitioners' claims under Title I, LMRDA and Sec. 301, LMRA.

The petitioners are employees of International Harvester Company (Harvester), currently operating as 'Navistar', at its engine plant in Indianapolis, Indiana, and are members of International Union, United Automobile, Aerospace, Agricultural & Implement Workers of America (UAW) and its affiliates Region 3 and Local 98. (Collectively, the Union).

The respondents are parties to a Collective Bargaining Agreement dated May 2, 1980, known as "Master Agreement". "Master Agreement", at Article XVI, Sec. 6(e), provides for the consideration of seniority employees for voluntary employer-approved transfers between respondent Harvester's plants, provided their work operations travel with them. In late 1981 and early 1982, the respondents entered into negotiations to supplement the "Master Agreement". Negotiations were conducted in Chicago, Illinois in a confidential manner. and the membership of Local 98 was not advised at any time of the specific content of any proposed supplement or amendment to "Master Agreement" under consideration by the respondents.

On May 2, 1982, a special meeting was called to ratify the supplements negotiated between the respondents. No notice of the meeting was provided to approximately Three Hundred Fifty (350) employee/members who were on layoff from Harvester at that time. Furthermore, all employee/members who had been on layoff for more than six (6) months, and many employee/members who had been on layoff for less than six (6) months, were, by Union Executive Order, specifically denied the right to vote at the meeting.

Petitioner members were denied proper notice and thereby an opportunity to even speak on the ratification of the supplemental agreement. They were clearly eligible to vote as they had a property right (seniority) sufficient to entitle them to vote on a matter that would drastically alter their layoff and recall seniority rights. The disputed supplemental agreement, known as "Master Recall", includes provisions amending the transfer provisions of "Master Agreement" by requiring the transfer of employees with full seniority rights from defunct Harvester plants to another operational facility.

The negotiations and the subsequent amendments to "Master Agreement" were at all times represented by respondents as being in the nature of 'economic concessions' to facilitate continued operations at Harvester plants across the country. "Master Recall" was not an economic item of interest to Harvester and was not an item of primary economic

interest to those employees not on layoff. It was an item of primary political interest to the UAW hierarchy. As a result, "Master Recall" had a disasterous impact on the layoff and recall seniority rights of the laid-off Three Hundred Fifty (350) employee/members who were denied the right to vote at the May 2, 1982 meeting.

"Master Recall" was ratified by a vote of Two Hundred Thirty-five (235) for and One Hundred Twenty-nine (129) against. Clearly, the votes of the Three Hundred Fifty (350) employee/members who were denied the right to vote and who were adversely affected by any changes in "Master Agreement", pertaining to layoff and recall seniority rights, would have had a substantial impact on the outcome of the ratification vote.

As a result of the respondents' secrecy in both the negotiation and ratification stages of "Master Recall" the petitioners, after being recalled from layoff, remained unaware of the diminution of their recall seniority rights until April, 1983. At that time, approximately Two Hundred Fifty (250) employees were transferred to the Indianapolis facility with full seniority rights, thereby displacing the petitioners with respect to their accrued layoff and recall seniority rights.

Some of the petitioners sought redress through the grievance procedure outlined in "Master Agreement". However, it soon became apparent that grievance/arbitration proceedings were not applicable, thereby requiring the petitioners to seek other means of redress. The International Constitution of respondent UAW and the Bylaws contained therein provide for the calling of a special meeting of a local affiliate upon the petition of twenty-five (25) members. On June 12, 1983, a petition bearing the signatures of over One Hundred Fifty (150) employee/members was presented to the vice-president of Local 98.

The petition requested a special meeting of Local 98 to consider nullification of the original ratification vote and a new vote so that all eligible members could be afforded their voting rights. On July 20, 1983, the president of Local 98 responded by letter that the petitioners' request could only be considered by International UAW. On August 5, 1983, the

petitioners' attorney wrote International UAW requesting clarification of the response from Local 98. Petitioners were then advised, in writing by International UAW, through the office of the president, that their request could only be heard by first appealing to Local 98. In August of 1983, Local 98 and Region 3 mailed to the employee/members, at their homes, a letter advising them to cease and desist their efforts in this matter, and threatened them with financial responsibility for any legal fees incurred by the respondents.

Having nowhere else to turn, the petitioners then filed a class action in the Southern District of Indiana for injunctive relief and damages for violations of the Labor-Management Reporting & Disclosure Act of 1959 (LMRDA), Title I, Secs. 101 and 102, 29 U.S.C. Secs. 411 and 412, and the Labor Management Relations Act of 1947 (LMRA) Sec. 301, 29 U.S.C. Sec. 185. Specifically, the petitioners' complaint requested 1) a determination that the suit be maintained as a class action on behalf of the class; 2) a determination of the Defendant class; 3) a finding that the petitioners had exhausted their internal remedies with no relief; 4) the issuance of a preliminary and permanent injunction to enjoin the respondents from enforcing the provisions of "Master Recall"; 5) a return to the status quo ante; and 6) punitive damages in the amount of Thirty-five Million Dollars ($35,000,000.00).

The basis for the complaint was that the respondents illegally adopted and ratified "Master Recall". It is undisputed that petitioners were denied their right to vote on "Master Recall". These unlawful actions by respondents have deprived the petitioners of their right to vote as guaranteed by Title I of the LMRDA, effectively depriving them of a valuable and unique property right, their seniority. It was this deprivation of voting rights which gave rise to a consequential complaint. Specifically, the respondents unlawfully interpreted, negotiated and implemented the "Master Agreement" between Harvester and UAW and the Local Supplemental Agreement on Seniority between Harvester and Local 98, thereby violating the LMRA.

It is further the case that the above actions of the respondents violated petitioners' rights guaranteed by the UAW Constitution, and the Constitution and Bylaws of Local 98. Petitioners alleged in their Second Amended Complaint, filed May 9, 1984, that these collusive actions deprived them of a seniority property right, without due process, in violation of the Fifth Amendment to the United States Constitution.

On December 5, 1983, petitioners filed a Motion for Determination by Order that a Class Action Be Maintained. The District Court denied petitioners' motion to have the case certified as a class action, by declaring it moot after the District Court entered its final judgment. The respondents filed a motion for summary judgment on grounds that petitioners' LMRA Sec. 301 claim was time-barred by Sec. 10(b) of the NLRA. Included in their motion was a request that the court apply LMRA, Sec. 301 and thus, the time limitation of Sec. 10(b) of the NLRA, to bar petitioners' LMRDA Bill of Rights claim. Harvester included in their motion for summary judgment an additional premise that, as an employer, they were not a proper party to an LMRDA lawsuit.

Petitioners filed a timely brief in opposition to the respondents' motions for summary judgment showing that it was proper for Harvester to be made a defendant in an LMRDA suit, and that the petitioners had exhausted their administrative remedies. Furthermore, consistent with federal policy, that the appropriate statute of limitations should be borrowed from analogous Indiana statutes regarding tort and contract actions.

The District Court sustained respondents' motions for summary judgment as to LMRDA Secs. 101 and 102, finding the claims time-barred by the statute of limitations 'borrowed' from Sec. 10(b) of the NLRA, as applied in typical hybrid 301/fair representation cases. The court drew this conclusion from their application of Sec. 10(b) to petitioners' secondary LMRA claims.

The Seventh Circuit Court of Appeals upheld the Judgment of the District Court, which dismissed petitioners' claims. The District Court and the Court of Appeals admitted that actions brought under LMRDA and LMRA are unique in

that neither contains its own statute of limitations. As both courts recognized, the proper starting point in such a case is to borrow the most analogous state statute of limitations. Having said that, however, both courts began their analyses with a discussion of the appropriate federal statute of limitations. This reverse analysis is in direct conflict with the conclusion in DelCostello that absent a federal statute of limitations, "Congress intended that the courts apply the most closely analogous statute of limitations under state law". 462 U.S. at 158.

Only by incorrectly classifying petitioners' LMRDA and LMRA claims as those of a typical 301 hybrid case was the District Court able to find that the appropriate statute of limitations was that of Sec. 10(b) NLRA. This classification is flawed. All the petitioners' claims commence with a Title I, LMRDA "Bill of Rights" violation, and thus are virtually independent of any contractual provisions governing relations between the parties. The need for uniformity of time limitations in Sec. 301 'hybrid' cases is simply not present in this case.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION OF DelCOSTELLO TO LMRDA CLAIMS IS CREATING WIDESPREAD CONFLICT AMONG THE LOWER COURTS

This court fashioned its application of the NLRA Sec. 10(b) six-month time limitation to unfair labor practice claims against both the union and an employer, (hybrid Sec. 301/fair representation claims) with DelCostello v. International Brotherhood of Teamsters, et al., 462 U.S. 151 (1983) for reasons that do not apply to pure, free standing LMRDA claims.

First came the conclusion that "state limitation periods for vacating arbitration awards are inadequate for a hybrid Sec. 301/fair representation suit." Id. at 166. This court then determined that analogous state statutes of limitation are

unrealistically long for application to fair representation claims. Analogous state limitations, such as for malpractice, generally "preclude the relatively rapid resolution of labor disputes favored by federal law." Id. at 168. As noted in DelCostello, this disparity worked against the "employees' ability to recover most of what is due them" because of the short arbitration limitations period. Id. This court then found a "family resemblance" between unfair labor practices, breaches of duty and employer violations of a collective bargaining agreement. Id. at 170.

In light of the foregoing conclusions and the need for uniformity and a balancing of the interests, this court adopted Sec. 10(b) of the NLRA for use in hybrid Sec. 301/fair representation suits involving arbitration and grievance proceedings. Id. at 171. This court twice cautioned that the DelCostello opinion is not to be seen as a departure from the established federal policy of borrowing state limitation periods for federal causes of action, stating finally that "resort to state law remains the norm". Id. As Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986) noted in a footnote:

> Several courts have taken this statement to heart and have refused to apply, to other situations as well as the one before us, the six month statute of limitations which the Supreme Court in DelCostello borrowed from the National Labor Relations Act. See, e.g., Monarch Long Beach Corp. v. Soft Drink Workers, Local 812, International Brotherhood of Teamsters, 762 F.2d 228, 331 (2d Cir. 1986) (company sues union for damages for injuries from secondary boycott; court narrowly construes DelCostello and turns to state law for limitations period); United Brotherhood of Carpenters and Joiners of America, Local 1020 v. FMC Corp., 724 F.2d 815, 817 (9th Cir. 1984) (union seeks to set aside arbitration on ground decision does not draw essence from collective bargaining agreement; court rejects DelCostello and adopts law on challenging arbitration); International Union of Electrical, Radio and Machine Workers v. Ingram Manufacturing, 715 F.2d 886,

888-89 (5th Cir. 1983) (same, employer seeking to set aside arbitration); Bernard v. Delivery Drivers, 587 F.Supp. 524, 524-5 (D. Colo. 1984) (rejecting section 10(b) for LMRDA claim because reasoning of DelCostello inapplicable); Gordon v. Winpisinger, 581 F.Supp. 234, 238 (E.D.N.Y. 1984).
784 F.2d at 5, fn. 4.

As the reasoning in DelCostello is illuminated it becomes clear that the ruling was tailored especially to provide uniformity of time limitations for "hybrid" 301 suits that deal solely with contract violations, arbitration decisions and grievance denials.

In the present case, the District Court applied the NLRA Sec. 10(b) time limitation to appellants' pure, free standing LMRDA Title I claim. DelCostello does not provide for such application. The District Court's ruling was improperly based on a string of cases leading down from DelCostello to Vallone v. Teamsters Local 705, 755 F.2d 520 (7th Cir. 1984). The plaintiff in Vallone lacked standing to qualify for a claim under LMRDA and the Seventh Circuit affirmed the application of Sec. 10(b). The Vallone opinion was improperly predicated on Bigbie v. Teamsters Local 142, 114 LRRM 2468 (N.D. Ill. 1983), where plaintiffs failed to even state a claim under LMRDA upon which relief could be granted. There was no injury, no damage and no standing. Additionally, the Seventh Circuit improperly relied on DelCostello and Metz v. Tootsie Roll, Inc., 715 F.2d 299 (7th Cir. 1983) cert. denied 464 U.S. 1070, 104 S. Ct. 976 (1984), to support the conclusion that LMRDA suits are subject to the same limitations applicable to hybrid Sec. 301/fair representation cases. DelCostello does not support this conclusion.

DelCostello, with its hybrid Sec. 301/fair representation claim presented "a direct challenge to the private settlement of disputes under the collective-bargaining agreement". 462 U.S. at 165, (quoting United States Parcel Service v. Mitchell, 451 U.S. 56, 66 (1981) (Stewart, J. concurring in judgment), quoting International Union, UAW v. Hoosier Cardinal, 383 U.S. 696, 702) (1966)). Therefore, this court applied section 10(b) NLRA limitations to achieve uniformity and stability.

It is certain that a challenge to the settlement of disputes under the collective bargaining agreement is not manifest in appellants' claim under Title I, LMRDA. The denial of voting rights in an internal union referendum is not within the purview of the grievance/arbitration/collective bargaining processes extant in external union labor relations.

As with Doty, "We draw the clear conclusion that Del-Costello is not the kind of precedent that lends itself as a springboard for easy application to other rights, statutes and policies. Rather, it is a closely reasoned exception to a general rule which illuminates a rather narrow path." 784 F.2d at 6.

The basis of this appeal is the charge of a denial of voting rights guaranteed by LMRDA Title I. Record, Document No. 2. Had the union properly notified the laid off appellants of the May 2, 1982 contract ratification meeting and permitted them to vote on the proposal for altering their layoff and recall seniority rights,[1] there would have been no cause of action.

The application of the Sec 10(b) time limitation to this cause of action is not supported by federal statute or Supreme Court doctrine.

The case here is first and foremost a pure, free standing LMRDA Title I cause of action with no dependancy or relationship to a hybrid Sec. 301/fair representation charge. The charge of a denial of voting rights stands on its own two feet. It could have been filed absent any Sec. 301/fair representation claim, and draws no support from that quarter.

In this case the denial of voting rights charged under LMRDA Title I precipitated the LMRA Sec. 301 charge. The internal union actions depriving appellants' voting rights affected the external economic circumstances of the appellants in that it altered their tenure of employment with a

[1] It is well settled in the Seventh Circuit that seniority is a property right. Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936); Hunter v. Atchison T.&S.F. Ry. Co., 171 F.2d 594 (7th Cir. 1948), cert. denied, 337 U.S. 916 (1949).

diminution of their layoff and recall seniority rights. By no stretch of the imagination is this Title I charge an unfair labor practice as defined in the NLRA. Rather, it is a denial of voting rights in a union referendum, which is outside the scope of the grievance/arbitration procedures covered by the NLRA and LMRA. On that basis alone, the application of Sec. 10(b) time limitations to a pure, free standing LMRDA discrimination charge should be proscribed.

Two Circuit Courts of Appeals have read DelCostello as commanding the importing of the NLRA Sec. 10(b) six month time limitation into free standing LMRDA Title I cases. See Davis v. Local 970, 765 F.2d 1510 (11th Cir. 1985) cert. denied, 106 S.Ct. 1284 (1986); Local 1397 v. Steelworkers, 748 F.2d 180 (3rd Cir. 1984). In both cases the courts found that the union democracy internal claims under LMRDA Title I required the same time limitation as the external grievance/arbitration claims at stake in DelCostello.

The decision in Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986) is in direct conflict with Davis and Local 1397. In a well reasoned analysis of the legislative history behind LMRDA Doty reports that the "Congressional debate on LMRDA includes repeated references to Title I as a 'bill of rights' akin to that in our federal constitution, and the concern expressed was for individuals in relation to their 'government' ". 784 F.2d at 7. Doty goes on to say,

> We draw from this history the sense that claims under Title I's bill of rights were viewed primarily as civil rights matters. It was not coincident that Title I was labeled a 'bill of rights' and we believe it therefore more logical to apply a statute of limitations for pure Title I claims from a civil rights statute than from an unfair labor practices statute. Id. at 8.

The Doty court dissected and refuted the opinions in Davis and Local 1397. 784 F.2d at 19, 20-3. The court then proceeded to apply a limitations period from the Massachusetts three year statute of limitations for tort actions, stating,

> [O]ur foregoing discussion fully explains why we view an LMRDA Title I claim as analogous to a civil

> rights action. . . . Massachusetts does have a state civil rights act, . . . But, . . . no explicit statute of limitations . . . the appropriate limitations period . . . should be borrowed from state tort law. Traditionally, civil rights actions have been considered to state a cause of action in tort . . . .
>
> 784 F.2d at 11. (emphasis added)

Appellants here argue that the most analogous statute of limitations to be applied in this LMRDA Title I claim is Indiana Code Sec. 34-1-2-2 (1982 Ed.) providing a two year limitations period for actions in tort.[2] Indiana, as with Massachusetts, has a Civil Rights Act, but no explicit statute of limitations. Record, Statement of Plaintiffs-Appellants re Gibson v. AT&T Technologies, Inc., at 7-8.

As Doty recognized, there are circumstances "where LMRDA Title I claims have been appended to a classic 'hybrid' 301 suit to set aside an employer-union compromise on an economic issue where the union violated its duty of fair representation." 784 F.2d at 4, (citing Adkins v. International Union of Electrical Workers, 769 F.2d 330 (6th Cir. 1985); Vallone v. Teamsters Local 705, 755 F.2d 520 (7th Cir. 1984); and Linder v. Berge, 739 F.2d 686 (1st Cir. 1984)). Adkins, Vallone and Linder are not free standing LMRDA Title I cases. In fact, the Seventh Circuit chastised the appellants in Vallone for attempting to "twist the facts and distort the fundamental nature of their complaint" simply to escape the LMRA Sec. 301/fair representation, 10(b) statute of limitations. 755 F.2d at 523.

The difference between the case at hand and Adkins, Vallone and Linder is that the latters' LMRDA claims were predicated on their hybrid Sec. 301/fair representation claims

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2 This same statute of limitations is applied to Federal 1983 Civil Rights cases in Indiana. See, e.g., Bell v. Metropolitan School District of Shakamak, 582 F. Supp. 3 (S.D. Ind. 1983).

and were not free standing. This case presents precisely the opposite situation.[3]

The fact that the appellants charge Harvester as a party to the LMRDA claim should not go unnoticed. Appellee Harvester has maintained that it cannot be sued under LMRDA Title I and that such a suit is 'frivolous'. A suit under Title I of the LMRDA may not be brought against an employer exclusively. However, an employer may be a party to a suit brought against a union under LMRDA. Appellants' claim is that Harvester acted in collusion with the union to violate appellants' rights under LMRDA Title I. See Plaintiffs' Reply Brief at 2, 3.

Appellants are cognizant of this court's denial of a petition for a writ of certiorari in Davis v. UAW Local 970. Rather than accepting Harvester's statement that the denial of certiorari is tantamount to approval for the application of Sec. 10(b) to free standing LMRDA claims, appellants would look to the other side of the coin. Davis cannot be construed as this court's affirmation of the application of Sec. 10(b) to a bona fide LMRDA Title I suit. As with Vallone and Bigbie there are questions of standing in Davis. Close scrutiny reveals several unanswered questions that should preclude certiorari. The plaintiff in Davis suffered no injury. Furthermore, federal jurisdiction was questionable and the plaintiff may have purposely precipitated his alleged injury by violating protected procedure applicable to both parties.

The application of the Sec. 10(b) time limitation to a pure, free standing LMRDA cause of action is not supported by federal statute or Supreme Court doctrine.

The Seventh Circuit has here held that the petitioners' Fifth Amendment due process claim was properly denied, insofar as it lacked requisite governmental action by the

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3 The Seventh Circuit was properly apprised of Doty on March 20, 1986, with sixteen copies of the First Circuit's slip opinion dated February 10, 1986.

respondent unions. p. A-15, infra. Then the court presents an extensive string of case cites.

This Court has had occasion to consider when private persons or organizations are cloaked with sufficient governmental power to render their actions those of the government. This Court has specifically declared that even absent formal governmental involvement in the activities of private persons, it still may be that private actions are state actions. Marsh v. Alabama, 326 U.S. 501 (1946); Terry v. Adams, 345 U.S. 461 (1953). With these cases, as here, the private parties had the power to deprive constitutional rights, giving them powers equivalent to those of the government. Id. The purpose of cloaking certain private actions with state 'color' is to ensure that peoples' constitutional rights are not deprived without affording them recourse.

The Union's wilful failure to provide petitioners with notice in this case prevented petitioners from being aware their property rights were being legislatively altered by union governmental processes. The Union, acting under the authority granted by federal law, assumed the powers granted by Congress in the National Labor Relations Act. As noted by this Court in Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192 (1944), "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." 323 U.S. at 202.

In this case, acting under the authority granted them by Congress, and the National Labor Relations Act, the union brought to a vote, absent over three hundred fifty (350) petitioners on layoff, a seniority adjustment which had the painful effect of destroying the petitioners' accrued seniority rights. This procedure lacked due process. The petitioners had a valuable property right, seniority, commanding constitutional protection. As the Seventh Circuit stated in Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936) to deprive an employee of his seniority without due process is a "violation of his constitutional rights protected by the Fifth Amendment." at 482.

Seniority is to unionism what free speech is to the Bill of Rights in the United States Constitution. Without seniority there would be no union. It represents job security, the matrix of unionism.

Congress never intended labor unions to have the power to alter seniority rights of employees without due process of law. As Justice Douglas stated in his concurring opinion in International Association of Machinists v. Street, 367 U.S. 740 (1961), "Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them." 367 U.S. at 777.

The issue of constitutional liability in the public and private sectors was recently addressed by the Fourth Circuit in Beck v. Communication Workers of America, 776 F.2d 1187 (1985), aff'd on rehearing 800 F.2d 1280 (1986), cert. granted, 55 U.S.L.W. 3807 (1987). The Court stated, "The differences between public sector and private sector collective bargaining simply do not translate into deficiencies in First Amendment rights." 776 F.2d at 1225. (citing Abood v. Detroit Board of Education, 431 U.S. 209 at 232 (1977)). Beck was dealing with the rights of association, protected under the First Amendment, which were violated by the union's unwarranted use of agency shop fees for political purposes. The court's analysis went directly to the collective bargaining power acquired by the union through federal statute,

> Governmental involvement and governmental action in this case . . . is indisputable. The right of action herein has its roots in the National Labor policy embodied in the NLRA and Taft-Hartley Act and is a part of the legislated national labor policy, that according to the Supreme Court in NLRB v. Allis-Chalmers Mfg. Co. . . . 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all the employees.'

Beck, 776 F.2d at 1207. Plaintiffs' Reply Brief at 10.

The need to protect the individual employees from an arbitrary deprivation of their constitutional rights is heightened in the labor union setting. Harvester employees are required to belong to the union. They are then required to submit to the governing powers of the union leaders.

It would be a gross miscarriage of justice to allow the one-sided bargaining process and secret vote to permanently deprive the petitioners of their fundamental rights, and then shield the union from liability. The union is the sole bargaining representative of the petitioners, and they are unable to or be heard without the union. In this case, it is the union itself which deprived the petitioners the right to speak which deprivation resulted in a violation of the petitioners' Fifth Amendment rights.

> During the early stages of the drafting of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter LMRDA), the Senate Committee on Labor and Welfare reported, 'Under the National Labor Relations and Railway Labor Acts, the union which is the bargaining representative has power in conjunction with the employer to fix a man's wages, hours and conditions of employment . . . . The government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent.' S. Rep. No. 187, 86th Cong. 1st Sess. (1959) (see Legislative History of Labor-Management Reporting and Disclosure Act of 1959, USCCAN, Vol. 2, p. 2336). The Senate Committee is speaking to the Bill of Rights in the LMRDA and they include referendums on union business affairs such as contracts and seniority rights.
>
> Record, Document No. 31 at 3-4.

As the senior senator from Arkansas has said: "There is no reason why a union man should be required to leave the rights guaranteed to him by the Constitution of the United States at the door when he goes into a union meeting." Doty v. Sewall, 784 F.2d 8 (1st Cir. 1986), citing 105 Cong. Rec. 14, 193 (1959). (Representative Griffin speaking)

II.
THE COURT OF APPEALS HAS NOT RECOGNIZED GENUINE ISSUES OF FACT AND THE DOCTRINE OF FUNDAMENTAL ERROR.

Doty v. Sewall, 785 F.2d, 1 (1st Cir. 1986) states:

In most cases a Title I plaintiff will be a union member who, unlike many unfair labor practice claimants, has not lost his job but wishes to remain a member. To decide to sue one's co-workers and superiors who have much to do with one's future fate even if one is successful gives pause. Such a decision is not lightly taken; the pressures on such a plaintiff to collect facts, retain an attorney and reflect suggest the inappropriateness of a six month period.

785 F.2d at 9.

The record in this case discloses the following:

As a result, we have been informed that a petition is being circulated in the Indianapolis plant in an effort to rescind the Master Recall Agreement. We are also informed that those who are circulating the petition are also seeking financial contributions to support their effort.

The International Union, Harvester Council and Local 98 are not supporting this petition nor the request for money from employees to support an attorney to charge us with violating a part of the Master Agreement that was ratified by all of the members covered under the agreement. Our legal counsel advises that the issue has been before the appropriate courts and federal agencies who have upheld the contract and further, the union would, if forced in the courts on this issue, take the necessary steps to recover all costs to the International Union, Harvester Council and Local 98. Record, Document No. 2, Exhibit F-1, F-3, (signed by Bill Casstevens, Vice-President, UAW and Dallas Sells, Director,

Region 3-UAW). The above quotes from Doty and the Record depict how the stage was set at the outset of this case.

Normally, an employee is instantly aware of the perceived violation. It took those members who had some inkling that they had been damaged at the May 2, 1982 ratification meeting approximately a year to determine that they had actually suffered harm. Since there was no grievance/ arbitration procedure available to them, they were compelled to look to the International and Local 98 constitutions. However, this was virtually impossible because the union would not make International constitutions available to the appellant members.

When appellants were recalled to work late in 1982 and early 1983, their attempts to obtain copies of the UAW Constitution to determine the propriety of the ratification vote were frustrated at every turn by union officials and personnel employees at the Union's local office. (Plaintiffs' Opening Brief at 24 and 25). Fifteen affiants attest that they were unable to obtain copies of the UAW Constitution. Id.

The coalition of voiceless members who had been wronged by both union and management was non-existant until the first transferee came into their bargaining unit with full seniority and pre-empted local members junior to that transferee's seniority date. This first occurred on March 7, 1983. Prior to March 7, 1983 there is no evidence that any appellant employee would suffer injury. The Union assured them that it was highly unlikely they would ever be affected by "Master Recall", and that "Master Recall" was not a change but merely a reorganization of seniority rights. Id. This was patently false. Record, Transcript at 30 and 168.

DelCostello v. International Brotherhood of Teamsters, et al., 462 U.S. 151 (1983) is predicated on grievance/arbitration proceedings. In the present case neither of these remedial steps were available to appellants. Any advance information that they were subject to injury was stifled by lack of notice and denial of a vote on ratification.

The interplay between big business and big labor was very complicated and subtle in this instance. The secrecy of

negotiations, (Plaintiffs' Opening Brief at 35), and the fact that their own union officers did not protect their seniority surprised the appellants and initially threw them off balance. It took time for them to realize that their seniority had been bartered away to illegally provide jobs for transferees from other Harvester plants. This is one of the many genuine issues of fact in this case.

Negotiations between Harvester and the UAW International Union to deprive appellants of their local recall seniority rights were an illegal violation of "Master Agreement." Local seniority is governed by the UAW International Constitution, and the supplemental agreement between Harvester and Local 98. Id. at 15-16. There is no authorization in either document for negotiating company-wide seniority. Therefore, there exists a violation of the UAW International Constitution by the Union and violation of the Harvester-Local 98 supplemental contract by Harvester. Id. at 9. (Quoting I.C. Sec. 22-7-2-1 [Burns 1983]). See also NLRB v. Allis Chalmers Manufacturing Co. et al., 338 U.S. 182 (1976); Scofield v. NLRB, 394 U.S. 426 (1969). Additionally, the Local 98 Constitution (contract) was violated by the Union. (Plaintiffs' Opening Brief at 9).

The shining paradox in this case is the introduction into evidence by the appellants of Bryant v. International Union UAW, et al., Cause No. IP77-542-C (S.D. Ind. 1981), where Harvester and the Union argued and won the point that seniority is controlled by local agreement, not "Master Agreement." In light of that case the union was estopped here from placing control of seniority in "Master Agreement." (Plaintiffs' Opening Brief at 16).

The Union breached "Master Agreement" and the Local 98 supplemental agreement in collaboration with Harvester, using this breach as a bargaining chip to establish "Master Recall". Id. at 10. In sum, the Union breached four separate contracts and Harvester breached two of the four in collaboration with the union. Id. at 9-12. There was no avenue for private settlement. There was no party with whom plaintiffs could file a grievance. Given the hostility of the union

officers, there was no appeal to the union hierarchy. Record, Document No. 2, Exhibits C, E and F-1, 2, 3. It is the foregoing breach of contracts that persuaded the argument of application of the analogous Indiana Code Sec. 34-1-2-1.5 (2 years governing oral employment contracts) in the fashion of International Union, UAW v. Hoosier Cardinal, 383 U.S. 696 (1960). Again, there are genuine issues of fact.

The District Court held that the Sec. 10(b) statute of limitation begins to run when "the claimant discovers, or in the exercise of reasonable diligence should have discovered, the act or acts triggering the alleged violation." District Court's Opinion at A-16, (quoting Metz at 304, quoting Hungerford v. United States, 307 F.2d 99, 102 (9th Cir. 1962)). The lower court determined the time for discovery to be the ratification meeting of May 2, 1982. Appellants were not notified of the meeting and if they had been in attendance they would have been denied the right to vote on their own seniority.

The Seventh Circuit noted in the following quotation, "Causes of action based on entry into collective bargaining agreements accrue, and section 10(b) starts to run when the contract is signed." Quoting United Independent Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1262, 1273 (7th Cir. 1985). The foregoing is the other theory for determining when limitations begin to run provided there is no clear evidence of finality in a grievance or arbitration procedure. This procedure is not proposed in DelCostello.

The Hungerford, Metz, and Independent Flight Officers analogies do not fit the case here. In Independent Flight Officers, all members (including retired members) were constantly aware of the voting proceedings, via proper notification. Secret negotiations and lack of proper notice completely nullify the "discovery rule" espoused in Hungerford and Metz. (Plaintiffs'Opening Brief at 32-34). At best it is a geniune issue of material fact. There is no substantive evidence that proper notice or information was provided to

refute appellants' claim that they did not understand the impact of "Master Recall" until the first transferee displaced appellants on the plant-wide seniority list. Given the wide geographical distribution of appellants' homes and the lack of publicity it is remarkable that two or three laid-off members learned about the meeting. Further, they did not read about it in the news, but were informed by friends who were still employed.

Appellants rely on Mennonite Board of Missions v. Adams, 103 S. Ct. 2706 (1983) for the adoption of minimum standards for notice when a property right (such as seniority) may be altered by an entity or agency with the power to do so. (Plaintiffs' Reply Brief at 7). "Notice" in this case did not even approach the minimum standards established by this court.

Appellants here are caught in the crunch between "big labor" and "big industry". Their stand against the establishment should not diminish their rights. They have been denied the right to vote on a question concerning their property right, seniority, by a clever manipulation of labor-management proceedings and artful pleadings relying on inapplicable standards.

From the outset of this case appellants have been threatened and ridiculed by "big labor" and "big industry", while two hundred (200) of their claimed class of three hundred fifty (350) have lost their jobs to transferees from Harvester plants in other states.

The opinion of the lower court, upheld by the appeals court, that appellants should have known the potential harm of "Master Recall" at the time of the May 2, 1982 meeting or at any time after that and particularly before March 7, 1983 is unrealistic. The Court of Appeals states in their opinion, "within the relevant time period a reasonably diligent person should know the contents of the contract he is working under." Clift, et al. v. Harvester, et al., No. 85-1802 slip op. at 14 (7th Cir. May 6, 1987). (A-14). This sounds good, but there are important unanswered genuine issues of fact posited with that statement, beginning with "what is the relevant time

period?" and "what is a reasonably diligent person?", especially under shop law with hostile union officers. The society and culture that make up the law of the shop are not normally evident to writers of court opinions. The social climate for the appellants, while in the shop and during intra-union activities is a genuine and crucial issue of material fact when determining a reasonably diligent person in this instance.

As with Adkins v. General Motors Corp., 573 F.Supp. 1188 (S.D. Ohio 1983), the latest date on which the action could have accrued was ". . . defendants began to enforce those agreements (at the latest) in January of 1981 . . . . This 'enforcement' date should stand as the latest date upon which this action accrued." 573 F. Supp. 1194. In the present case, this is a genuine issue of fact which alone should have precluded summary judgment in favor of defendants.

The failure of defendants to plead and prove actual knowledge on the part of the plaintiffs at the time of the ratification vote compounds the genuine issue of material fact as to when the statute of limitation accrued. "As movants for summary judgment, GM and the UAW bear the burden of showing that everything in the record demonstrates that no issue of material fact exists . . . ." Benson v. General Motors Corp., 716 F.2d 862, 864 (4th Cir. 1983).

The mortal blow to appellants' cause was the lower court's ruling, after the fact, that plaintiffs' motion for determination of a class was moot. This was pointed out to the court of appeals as an issue. The court of appeals considered appellants' presentation of the issue on federal civil procedure to be unqualified argument. No. 85-1802 slip op. at 5. (A-6). If the court of appeals is correct in disqualifying appellants' challenge of the procedure on the mootness ruling, the court is then faced with fundamental error. This requires review of appellants' cause of action, whether assigned as error or not, where justice of the case seems to require it. See Black's Law Dictionary at 638 (1968 ed.) However, the circuit court disregarded this "Hobson's Choice" and delivered the "coup de grace" to appellants with a declaration that all sworn

affidavits of appellants (47 in total claiming all the points that establish genuine issues of material fact) irrelevant. Addressing the lower court's mootness ruling, the circuit court said, "The district court may have been incorrect when it determined that the class certification question was moot." No. 85-1802 slip op. at 5. (A-7). Prior to this observation they established jurisdiction sua sponte for the purpose of abolishing the class notwithstanding the fact that the district court may have been incorrect. Furthermore, the circuit court claims appellants did not "accurately state the facts" on the mootness question, but failed to identify the inaccuracies. Id.

It seems that sua sponte examination would call for even handed justice for a determination of the merits of both sides of the question, particularly where fundamental error is a factor.

A valid motion for determination by order that a class be maintained was properly and timely filed. Record, Document No. 9. The motion was not ruled upon while it was viable. This is an error of civil procedure, not a judicial prerogative.

Just as one lawyer may police the adherence of another to a statute of limitations, a higher court should police the lack of proper procedure in a lower court. This is particularly true when it is brought to the attention of the higher court and qualifies as fundamental error.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The questions here are vital to millions of union members. In passing the LMRDA Congress intended to protect those rights of union members that are basic to our U.S. Constitution. This Court has historically recognized such rights inviolate.

Petitioner requests that the conflict between circuit courts concerning the application of DelCostello be settled by this Court. Thereafter this entire matter should be remanded to the District Court for a proper determination of a class action and appropriate disposition after a full development of the facts.

Respectfully submitted,

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Counsel for Petitioners

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Appendix

IN THE

Supreme Court of the United States

October Term, 1986

DONALD JOSEPH CLIFT, On Behalf of Himself and All Others Similarly Situated,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AGRICULTURE & IMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Respondents.

SHORT APPENDIX TO WRIT OF CERTIORARI

George Franklin Hinkle, Esq.
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Indianapolis, Indiana 46205
(317) 923-9273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1802

DONALD JOSEPH CLIFT, et al.,

Plaintiffs-Appellants,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 83 C 1282 – **William E. Steckler,** *Judge.*

SUBMITTED FEBRUARY 18, 1987*–
DECIDED MAY 6, 1987

Before BAUER, Chief Judge, CUMMINGS and MANION, *Circuit Judges.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 34(f). All parties have filed statements concerning the necessity of oral argument. Upon consideration of those statements, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and records.

PER CURIAM. Four named plaintiffs brought a class action against their union and employer alleging violations of section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, and sections 101 and 102 of the Labor-Management Reporting and Disclosure Act, 1955 (LMRA), 29 U.S.C. §§ 411 & 412. In a subsequent motion, they sought leave to add a claim that they were denied due process of law in violation of the Fifth Amendment. On defendants' motions for summary judgment, the district court held that the statutory claims were time-barred. The court denied leave to amend on the ground that no government action was involved. The court did not certify the class action because it found that question moot since all of the plaintiffs' claims were being dismissed. The district court entered judgment for the defendants and plaintiffs appeal. For the reasons below, we affirm.

I

Both the plaintiffs and the defendants moved for summary judgment. In addition to numerous affidavits, the parties provided transcripts of testimony from a two-day hearing on a preliminary injunction. For our purposes, though, a brief description of the facts will suffice. Where necessary, additional facts will be brought out in our discussion of the applicable law.

Plaintiffs are employed by International Harvester Company (Harvester) at its engine assembly plant in Indianapolis. They are members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Local 98 of the UAW.[1] In late 1981 and early 1982, the UAW and Harvester entered into early negotiations for possible concessions on a 1980 collective bargaining

[1] When referring to the International we will use the term "UAW." When referring to Local 98, we will use the term "Local." The term "Union" will be used when it is unnecessary to distinguish the International and Local.

agreement that was not to expire until October 1982. The reason for the early negotiations was Harvester's precarious financial condition. A tentative agreement was reached at the end of April 1982. At the time, plaintiffs, and the class of about 350 employees they sought to represent, were on layoff from the Indianapolis plant, most for more than six months. The Local was informed that a tentative agreement was possible and notices were distributed at the plant concerning a meeting on May 2 regarding the contract negotiations. As it turned out, that was a meeting to explain and vote on the tentative contract. The Local did not consider the laid-off employees to be members in good standing entitled to vote on the contract (an interpretation contested by plaintiffs), so no special notices were sent to the laid-off employees, although they were not excluded from attending. The local media was told of the meeting, but advance reporting of the meeting by the media was apparently minimal if at all.

The new contract was approved by the Local by a vote of 235 to 129. The contract was approved nationwide by a vote of 7086 to 3949 and went into effect on May 3, 1982. The only provision relevant to the present case is the creation of a Master Recall List. The new contract provided for the keeping of a national list, by seniority, of eligible persons on layoff. If a particular Harvester operation had no local employees on layoff, those on the Master List were eligible to fill any job openings. Once hired at a new operation, that person took his seniority from his prior bargaining unit with him and thus could have higher seniority than persons who had worked at that particular operation for a longer period of time. The parties disagree on whether or not this new provision was significantly different from the prior contract and on whether the revision could be made nationally in contrast to the 1980 contract which provided for local arrangements on individual plant closings.

At the May 2 ratification meeting, the Local members present were told about the provision for a Master Recall List, but were advised that it would probably not affect them because all the laid-off Local employees had first to be recalled and that did not appear likely. As it turned out, though, all

the laid-off employees at the Indianapolis plant were subsequently recalled. On March 7, 1983, the first of several hundred transferees began work at the Indianapolis plant and were placed on the seniority list above some of the employees who had worked at the Indianapolis plant prior to March 7.

On September 6, 1983, more than seventeen months after the contract ratification but just under six months after the first transferee arrived, plaintiffs filed a complaint in the district court. They complained that the Master Recall provision had been improperly ratified because of insufficient notice to laid-off employees, failure to allow the laid-off employees to vote, the secrecy of the negotiations, and the alleged misrepresentation that Master Recall would not affect employees at the Indianapolis plant. The claims were pursuant to the LMRA and LMRDA. After plaintiffs' preliminary injunction was denied, both sides moved for summary judgment. The district court held that a six-month statute of limitations applied and that the cause of action accrued in May 1982 when the new contract was ratified. Plaintiffs' claims were therefore time-barred and it was unnecessary for the court to consider other grounds for dismissal. The court also denied leave to add the Fifth Amendment due process claim because there was no government action that would bring that Amendment into play. The district court found the question of class certification to be moot. Judgment was entered for the defendants and plaintiffs appeal.

II

We first consider plaintiffs' "argument" that the district court has failed to rule on the question of certification of this action as a class action. Plaintiffs' entire "argument" on this issue consists of the following:

> III. THE DISTRICT COURT ERRED IN NOT GRANTING PLAINTIFFS' MOTION THAT A CLASS ACTION SUIT BE MAINTAINED.
>
> The Plaintiffs originally filed this action as a class action on September 6, 1983. Plaintiffs subsequently filed a "Motion For Determination By Order That a Class Action be Maintained" on December 5, 1983. In the year and

> nine months that has passed since its filing, the district court has failed to rule on this Motion.

Plaintiffs' Brief at 39.

This does not qualify as an argument; ordinarily, we would not consider the issue at all. See Bonds v. Coca-Cola Co., 806 F.2d 1324, 1328 (7th Cir. 1986), and the cases cited therein. See also Fed. R. App. P. 28(a)(4); Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 41-42 (1984 ed.). But we cannot ignore this issue; if plaintiffs accurately characterized the facts, we might have no jurisdiction over the appeal. Compare Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987); Glidden v. Chromalloy American Corp., 808 F.2d 621 (7th Cir. 1986). We must raise jurisdictional issues sua sponte, even if not raised by the parties. See Arch Mineral Corp. v. Director, OWCP, 798 F.2d 215, 217 (7th Cir. 1986). Plaintiffs, however, did not fully and accurately state the facts in their "argument" and an accurate portrayal of the posture of this case is necessary for a proper resolution of the case.

The present case is distinguishable from Glidden. In Glidden, the district court granted a summary judgment motion for the defendants and dismissed the complaint. With the parties' agreement, the district court declined to decide if the action should have been certified as a class action and the court expressly withheld reaching a decision on class certification until after an appeal of the grant of summary judgment was decided. See id., 808 F.2d at 623. We held that we had no appellate jurisdiction under 28 U.S.C. § 1291 because there was no final judgment. Id. at 628. There was no interlocutory appeal under 28 U.S.C. § 1292(b), id. at 623; no partial final judgment under Fed. R. Civ. P. 54(b), id. at 623-24; nor was there any implicit granting, denial, or withdrawal of the class certification issue, id. at 624-27. In contrast, in the case now before us, the district court made an express ruling on the question of class certification: the court ruled that the certification question was moot. This was not a ruling on the merits of the class certification question which is what plaintiffs apparently still desire, but it is still a ruling on the question. Since there has been a ruling declining to grant class certifica-

tion and the district court entered a judgment for the defendants, there is a final judgment which we have jurisdiction to review. Cf. Gomez, 811 F.2d at 1034 n.1.

The district court may have been incorrect when it determined that the class certification question was moot. Compare id.; Glidden, 808 F.2d at 627; Napier v. Gertrude, 542 F.2d 825, 827 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977). But, since that issue has not been properly raised by the plaintiffs on appeal, we will not consider whether we should remand this case for a determination of the merits of the class certification question. Since we uphold the district court's decision on the statute of limitations issue, we also let stand the decision on the unargued (at the appellate level) issue of class certification. Cf. Gomez, 811 F.2d at 1034 n.1. Additionally, since the district court never certified this case as a class action, we treat this appeal as an appeal of the four named plaintiffs' individual claims. Cf. Simmons v. Drew, 716 F.2d 1160, 1161 (7th Cir. 1983); Case & Co. v. Board of Trade of City of Chicago, 523 F.2d 355, 360 (7th Cir. 1975); Roberts v. American Airlines, Inc., 526 F.2d 757, 762 (7th Cir. 1975), cert. denied, 425 U.S. 951 (1976); Lagorio v. Board of Trade of City of Chicago, 529 F.2d 1290, 1291 (7th Cir.), cert. denied, 426 U.S. 950 (1976). Cf. also Glidden, 808 F.2d at 624-27.

III

The provisions of the LMRA and LMRDA under which plaintiffs brought their claims do not have an express statute of limitations. Relying on DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) (LMRA), Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984) (LMRA) and Vallone v. Local 705, International Brotherhood of Teamsters, 755 F.2d 520 (7th Cir. 1984) (per curiam) (LMRDA), the district court borrowed the six-month limitation period from section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b). Plaintiffs argue that the proper limitation period to borrow is the most analogous state limitation period, in particular the two-year period for oral contract claims under

Indiana law. See, e.g., International Union, United Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); International Union of Elevator Constructors v. Home Elevator Co., 798 F.2d 222 (7th Cir. 1986). Alternatively, plaintiffs argue that even if the six-month limit applies, the cause of action accrued when the first transferee arrived on March 7, 1983 and therefore the complaint was timely filed within the six-month period. We first consider which limitation period applies to this case.

A

In Hoosier, a union brought suit under § 301 of the LMRA for the employer's failure to pay accumulated vacation pay as required by the collective bargaining agreement between the union and employer. That action was "essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action resembles an action for breach of contract cognizable at common law." 383 U.S. at 705 n.7. The Supreme Court decided that analogous state law should determine the appropriate statute of limitations, id. at 704-05, which in that case was Indiana's six-year period for claims in which the contract is not entirely in writing. Id. at 707. The Court expressly reserved its judgment as to whether other types of § 301 suits might require the application of different rules of timeliness. Id. at 705 n.7. Seventeen years later, the Court decided that in "hybrid" § 301 suits, involving both employer violations of the collective bargaining agreement and the union's failure to fairly represent the complaining employee, the appropriate limitation to borrow is the six-month limitation period for unfair labor practices found in § 10(b) of the NLRA. DelCostello, 462 U.S. at 155. Hoosier was distinguished as "a straightforward suit under § 301 of the [LMRA] for breach of a collective bargaining agreement by an employer. Unlike the present cases, Hoosier did not involve any agreement to submit disputes to arbitration, and the suit was brought by the union itself rather than by an individual employee." DelCostello, 462 U.S. at 162. Hoosier also did "not involve 'those consensual processes that federal labor law

is chiefly designed to promote--the formation of the collective agreement and the private settlement of disputes under it.' " DelCostello, 462 U.S. at 162-63 (quoting Hoosier, 383 U.S. at 702). Additionally, in Hoosier there was a closely analogous state cause of action. DelCostello, 462 U.S. at 163, 165. See also Home Elevator, 798 F.2d at 225-26 (comparing Hoosier and DelCostello). In a recent case, we held that Hoosier's approach of borrowing the most closely analogous state limitation period continues to be the general rule even after DelCostello. Home Elevator, 798 F.2d at 223. Plaintiffs argue that their claims are closer to the straightforward breach of contract claims of Hoosier and Home Elevator than to the hybrid claims of DelCostello[2] and therefore the appropriate limitations period is Indiana's two-year period for claims based on oral contracts.[3]

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2 We note that DelCostello is applied retroactively, so it does not matter that plaintiffs' claim accrued and became time-barred before DelCostello was decided. See Bonds, 806 F.2d at 1326.

3 In supplemental briefs, the parties discuss whether Gibson v. AT&T Technologies, Inc., 782 F.2d 686 (7th Cir.), cert. denied, 106 S.Ct. 3275 (1986), controls the decision in this case. Defendants argue that it does and plaintiffs take the opposite view. It is true that Gibson involves a fact situation somewhat similar to the case now before us. However, the principal issue in Gibson was whether federal labor law preempted a state law fraud claim regarding the employer's alleged misrepresentations concerning pension benefits under the collective bargaining agreement. We held that the state claim was preempted by federal law. Id. at 688. The plaintiffs in that case still could have made a claim under § 301, but it was barred by the applicable six-month statute of limitations. That case is not controlling because the parties apparently did not dispute that the six-month limitation period applied and therefore our opinion contains no discussion of why there is a six-month limitation period. See id. at 689. There is no argument in the present case that plaintiffs' claims are state law claims, not claims under federal labor law, so there is no preemption issue. Plaintiffs only argue that their federal claims are closely analogous to state breach of contract claims and therefore the state statute of limitations should be borrowed.

We do not find that plaintiffs' claims are merely straightforward breach of contract claims. It is not merely claimed that Harvester performed a breach by misapplying the collective bargaining agreement. Instead, it is claimed that Harvester and the Union improperly entered into a new contract. Harvester's alleged misconduct was primarily that it entered into a new agreement with persons not properly authorized to do so. (It is also alleged that Harvester improperly participated in secret negotiations.) That is not a straightforward breach of contract claim like Hoosier where the employer failed to pay accumulated vacation pay allegedly due to terminated employees under the collective bargaining agreement. See id., 383 U.S. at 698. Nor is it like Home Elevator, where the employer allegedly failed to pay the proper wage rate under the collective bargaining agreement. See id., 798 F.2d at 224. Instead, the present case involves the employer acting properly under the terms of a collective bargaining agreement with an allegation that the collective bargaining agreement is not the one to be followed. Also, like DelCostello, but unlike Hoosier and Home Elevator, this is a suit by individual employees against both the employer and the union, not a suit merely against the employer by the union.

Plaintiffs try to distinguish DelCostello because their case does not involve a grievance nor arbitration for which the Union failed to provide adequate representations. While it is true that this case does not involve "the private settlement of disputes under [the collective bargaining agreement]," which DelCostello involved, it does involve "the formation of the collective agreement"; both are "consensual processes that federal labor law is chiefly designed to promote." Hoosier, 383 U.S. at 702; DelCostello, 462 U.S. at 162-63. DelCostello cannot be distinguished simply because the Union's alleged improprieties arose during negotiations not during a grievance procedure. See United Independent Flight Officers, Inc. v.

United Air Lines, Inc., 756 F.2d 1262, 1270-71 (7th Cir. 1985).[4] Cf. Home Elevator, 787 F.2d at 228 n.5.

Additionally, we do not find a breach of contract claim to be closely analogous to the claims involved in the present suit. While it is possible that a state contract claim might involve questions of proper authority to enter into a contract, such contract questions are distinct from whether a union properly negotiated and ratified a contract under federal labor law. And the primary dispute in this case concerns whether the Union acted properly under federal laws controlling its decision-making processes. An unfair labor practice is a more closely analogous cause of action. See United, 756 F.2d at 1270-71. See also DelCostello, 462 U.S. at 170. Since this case involves a union's duties when negotiating a contract, an issue central to federal labor law, policy considerations favor a uniform statute of limitations. See United, 756 F.2d at 1271; DelCostello, 462 U.S. at 171. We therefore conclude that the appropriate statute of limitations to apply to the LMRA claims is the six-month limitation period found in § 10(b) of the NLRA.

Plaintiffs also argue that their LMRDA claims should not have been subjected to the six-month limitation period. We have previously decided that the reasoning in DelCostello applies equally to both LMRA § 301 claims and claims under sections 411 and 412 of the LMRDA. Vallone, 755 F.2d at 521-22. For the same reasons that we hold a six-month

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[4] Although United was decided under the Railway Labor Act, the relevant rules are no different than those applied under § 301 of the LMRA. See United, 756 at 1270.

limitation period to be applicable to plaintiffs' LMRA claims, we also hold that that period applies to the LMRDA claims.[5]

B

We have decided that the district court correctly determined that a six-month statute of limitations applies to plaintiffs' statutory claims. Plaintiffs still argue, however, that their claims were filed within the six-month period. Plaintiffs essentially make two distinct arguments by which their claims could be deemed to be timely. One is that the cause of action did not accrue until the problem actually was (or should have been) discovered. They argue discovery occurred when the transferees first arrived on March 7, 1983. The other argument is that the claim did not arise until the transferees arrived because that is when the injury first occurred, not when the contract was ratified. Both arguments fail.

The claims in this case concern the improper ratification of a collective bargaining agreement and the applicable statute of limitations is borrowed from § 10(b) of the NLRA. "Causes of action based on entry into collective bargaining agreements

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5 In their opening brief, plaintiffs conceded that Vallone was correctly decided, but argued that their particular LMRDA claim was not analogous to § 10(b) of the NLRA. In a supplemental brief, however, they appear to argue that the reasoning of DelCostello should not apply to LMRDA claims. They primarily rely on a recent case from the First Circuit, Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986). Doty, however, only involved a claim by a union member that his union improperly denied his transfer of membership. That claim did not concern the bargaining process nor any grievance with Doty's employer. While Doty includes general language as to why claims under the LMRDA should be distinguished from claims under § 301 of the LMRA, the decision is expressly limited to its facts. See id. at 4-5, 9. Also, a number of circuits are in accord with the conclusion we reached in Vallone. See Adkins v. International Union of Electrical Workers, 769 F.2d 330, 335 (6th Cir. 1985); Davis v. United Automobile Workers, 765 F.2d 1510, 1514 (11th Cir. 1985), cert. denied, 106 S.Ct. 1284 (1986); Local 1397, United Steelworkers v. United Steelworkers, 748 F.2d 180, 184 (3d Cir. 1984). We will not reconsider our decision in Vallone applying DelCostello to claims under sections 411 and 412 of the LMRDA.

accrue, and section 10(b) starts to run, when the contract is signed." United, 756 F.2d at 1273. Accord Metz, 715 F.2d at 305; Local 1424, International Association of Machinists v. NLRB, 362 U.S. 411 (1960). The claim does not wait to accrue until the time at which the contested provisions of the agreement are enforced. Id. It is also true, though, that the "limitation period begins to run '. . . when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violations].' " Metz, 715 F.2d at 304 (quoting Hungerford v. United States, 307 F.2d 99, 102 (9th Cir. 1962)) (ellipsis and brackets in Metz). Accord Vallone, 755 F.2d at 522. Thus, plaintiffs' claims accrued when the collective bargaining agreement was entered into in May 1982, unless the existence of the new contract could not reasonably have been discovered until later and was not actually discovered by plaintiffs until later.

The discovery rule is an exception to the time-bar rules and plaintiffs bear the burden of proving they fell within the exception. See Adkins v. International Union of Electrical Workers, 769 F.2d 330, 335 (6th Cir. 1985); Crawford v. United States, 796 F.2d 924, 929 (7th Cir. 1986); Drazan v. United States, 762 F.2d 56, 60 (7th Cir. 1985); Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974). Plaintiffs make a number of citations to the record in an attempt to show that at least some members of the Union did not discover the cause of action until March 7, 1983. But, as discussed in Section II above, the class action was denied and not appealed, so only plaintiffs' individual claims remain on appeal. Therefore, each individual plaintiff can only succeed if it was shown that he personally met the discovery exception. The experiences of the other potential class members are irrelevant to the resolution of this issue on appeal.

Initially, we note that plaintiffs appear to argue that they had to have been sent notice that would have satisfied constitutional due process requirements regarding notices sent for lawsuits or administrative procedures before they could be considered to have actual, or even putative, knowledge that their cause of action accrued. To the extent plaintiffs are making such an argument, we reject it. The cause of action

accrued if they had knowledge through any means or if they should have known. Cf. Metz, 715 F.2d at 304; Mull v. Arco Durethene Plastics, Inc., 784 F.2d 284, 288 (7th Cir. 1986); Hupp, 500 F.2d at 996-97. Similarly, any failure on the part of the Union to follow its own notice procedures is irrelevant if plaintiffs had actual knowledge of or otherwise should have known of the new contract provision. The Union's notice procedure could only be relevant to the extent employees reasonably and detrimentally delayed seeking out information because they reasonably expected that the Union would have informed them of new contract revisions. Cf. Hupp, 500 F.2d at 997.

Although they did not attend the May 2 meeting, Donald Clift knew of the meeting in advance and Jesse Hatcher learned about it in the evening after the meeting had adjourned. Reasonable diligence would have enabled both of them to discover the existence and contents of the new agreement well before March 1983. Moreover, both were recalled in June 1982 and on September 15, 1982 copies of the new agreement were distributed to employees. Furthermore, Hatcher states in his affidavit that he learned about Master Recall when he was recalled in June 1982. Stanley Wilson's testimony shows he returned from recall on January 10, 1983 and immediately thereafter learned about Master Recall. Clift's, Hatcher's, and Wilson's claims clearly accrued more than six months before the suit was filed in September 1983.

The only other named plaintiff is Donald Romaine. He did not testify at the preliminary injunction hearing, but his affidavit was submitted by the plaintiffs. He received no advance notice of the May 2 meeting, but he did return from layoff in October 1982. He also states that "I had no opportunity to be aware of the impact of the Master Recall List on my personal seniority until Master Recall transferees began arriving at our plant in the spring and summer of 1983 and it became apparent that they were preempting me on the plant-wide seniority list." As we discussed above, transferees' effects on a plaintiff's seniority did not determine when the claims accrued; entry into the new agreement was the relevant event. Romaine's affidavit is silent regarding when he learned

of the existence of the new agreement. Romaine therefore failed to meet his burden of showing that he satisfied the discovery exception to the May 1982 accrual date. Cf. Bonds, 806 F.2d at 1328; Hupp, 500 F.2d at 996; Adkins, 769 F.2d at 335. Additionally, the affidavit shows that Romaine returned to work in October 1982. Where there is no evidence that the contents of the contract were kept hidden from him, within the relevant time period a reasonably diligent person should know the contents of the contract he is working under. Cf. Metz, 715 F.2d at 304. Furthermore, the record shows that the signing of the new agreement, including specific reference to the Master Recall List, was well publicized in the Indianapolis newspapers. If Romaine acted with reasonable diligence, he should have known of the existence and contents of the new agreement more than six months before this suit was filed.

The LMRA and LMRDA claims were time-barred for all four plaintiffs.

C

Plaintiffs also argue that the district court should have permitted them to amend their complaint to add a claim pursuant to the Fifth Amendment. The district court denied leave to amend on the ground that the claim lacked merit. We agree. Absent the requisite governmental action, there can be no claim for a denial of constitutional due process. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51, 354 (1974), Anderson v. National Railroad Passenger Corp., 754 F.2d 202, 204-05 (7th Cir. 1984) (per curiam); Price v. International Union, United Automobile Workers, 795 F.2d 1128, 1130-33 (2d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3476 (U.S. Dec. 23, 1986) (No. 86-1055); Kolinske v. Lubbers, 712 F.2d 471, 474-80 (D.C. Cir. 1983). Compare Beck v. Communications Workers of America, 776 F.2d 1187 (1985), aff'd on other grounds, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), petition for cert. filed, 55 U.S.L.W. 3317 (U.S. October 17, 1986) (No. 86-637), and 55 U.S.L.W. 3454 (U.S. Dec. 11, 1986) (No. 86-966).

IV

For the reasons given above, we affirm the judgment of the district court.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD J. CLIFT, et al.	)	
	)	
v.	)	IP 83-1282-C
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.	)	

ORDER OF APRIL 9th, 1985

This matter is before the Court on motions for summary judgment filed by both defendants and on motions for leave to file an amended complaint and for determination by order that a class action be maintained filed by plaintiffs. Defendants oppose both of plaintiffs' motions. Having considered the motions, supporting and opposing briefs, affidavits and exhibits and the evidence and testimony admitted during the hearing on plaintiffs' motion for preliminary injunction, the Court finds that defendants' motions should be granted and that plaintiffs' motions should be denied.

This case is an action for injunctive relief and damages for alleged violation of the Labor Management Reporting and Disclosure Act of 1959 and the National Labor Relations Act. Plaintiffs are employees of defendant International Harvester Company (Harvester) at its engine assembly plant, 5565 Brookville Road, Indianapolis, and are members of the defendant unions (the International and Local 98). Plaintiffs allege that defendants have violated plaintiffs' voting rights under 29 U.S.C. § 411 by illegally ratifying a modification of the Master Bargaining Agreement concerning recall rights and seniority. Plaintiffs also allege that Harvester has breached the

collective bargaining agreement in violation of 29 U.S.C. § 185 and that the union has breached its duty of fair representation.

In April 1982, as part of a national agreement between Harvester and the United Auto Workers (UAW), a new transfer procedure was developed to provide for laid-off employees and those affected by plant closings due to Harvester's economic difficulties. Under the new method, a Master Recall List was compiled which included laid-off Harvester employees in certain categories throughout the Harvester system. All job openings in any Harvester plant are to be filled by the most senior, qualified employee on the Master Recall List. Employees transferred to a new operation because of a plant closing or partial closing retain their full seniority. This provision, along with the rest of the 1982 national agreement, was ratified by Local 98 on May 2, 1982.

Plaintiffs object to the Master Recall List and specifically the provisions allowing transferees to carry their full Harvester seniority to any new Harvester plant. Plaintiffs claim that they have lost seniority, which in turn affects their recall and lay-off rights, because transferees with more seniority are transferring to the Indianapolis plant and are displacing plaintiffs on the plant's seniority list. Plaintiffs allege that the Master Recall List substantially affected their seniority and recall rights by requiring Harvester to accept employees from other plants and by establishing seniority as a national issue instead of a local issue.

Plaintiffs also allege the 1982 ratification was illegal and therefore, the agreement is void. According to plaintiffs, approximately 350 employees who were laid off from the Indianapolis plant at the time of the May 2d vote were not allowed to attend the meeting or to vote on the new contract. Plaintiffs contend that these members were members in good standing and eligible to vote according to the Master Agreement, the International Constitution and By-Laws, and the National Labor Relations Act.

In response, defendants contend that the Master Recall List did not substantially affect plaintiffs' seniority rights, but rather was an administrative change to facilitate employee

transfers from closed Harvester plants to more prosperous Harvester plants. Defendants argue that the seniority provision under the Master Recall List has been part of the Master Bargaining Agreement since at least 1973. Defendants also contend that no employees were denied the right to attend the ratification meeting or denied the right to speak or ask questions and that no members, who were in good standing, were denied the right to vote on the new contract. Defendants argue that the union's good standing requirements are reasonable and comply with 29 U.S.C. § 411.

Defendants have raised several reasons for granting summary judgment. Harvester argues that there is no cause of action against an employer under 29 U.S.C. §§ 411 and 412, that plaintiffs' § 301 claim is barred by the six-month statute of limitations, and that plaintiffs failed to exhaust the intra-union procedures. The union argues that the action is barred by the statute of limitations, that the union's ratification procedure and voting requirements are reasonable and lawful and that the cause is moot because even if all 350 members of the proposed plaintiff class had voted against the 1982 contract, it still would have been ratified based on the national vote totals. The union also challenges the plaintiffs' interpretation of the prior contract provisions. Although the Court believes the evidence would support defendants' arguments on the merits, the Court finds that it need not address the merits of the case because the action is barred by the statute of limitations.

It is well established that hybrid § 301/ breach of duty of fair representation claims are subject to the six-month limitations period in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983); Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983). Recently the Seventh Circuit Court of Appeals has held that the six-month period also applies to claims brought under Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411, 412. Vallone v. Local Union No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, No. 84-1014 (7th Cir. December 19,

1984). Here, Plaintiffs did not file the present action until September 6, 1983, well past the six-month time period.

However, plaintiffs argue that their complaint is timely even if the Court determines that the six-month limitation applies to this action because some of the plaintiffs did not know about the ratification meeting and none of them knew the truth about the Master Recall provision until the transferees began arriving at the Indianapolis plant in March 1983. Plaintiffs allege that defendants disguised the nature and extent of the contract changes and deceived the local membership when the Master Recall provision was explained at the ratification meeting.

The statute of limitations begins to run when "the claimant discovers, or in the exercise of reasonable diligence should have discovered," the act or acts triggering the alleged violation. Metz, 715 F.2d at 304. Despite plaintiffs' contentions, the Court finds that the Master Recall List was fully explained at the meeting held May 2, 1982 and that a majority of those voting ratified the contract. Both affidavits and testimony reveal that the union members were told about the Master Recall List and the seniority provision. Questions were raised regarding the effect on the local members' seniority if transferees were to come to Indianapolis. The members were told their seniority could be affected in that event, but that they would be able to carry their seniority with them in the event the Indianapolis plant closed and they transferred to another plant. Although the union leaders told the members that there probably would be little actual effect on the Indianapolis plant, the Court does not find that the union deceived the plaintiffs or made misrepresentations to them. There is no evidence that at the time the contract was ratified defendants knew the Indianapolis plant would be prosperous enough to be able to recall all of its laid-off employees, much less that it would have job openings for transferees. Thus, plaintiffs should have known the meaning of the Master Recall List as of May 2, 1982.

The evidence also shows that notice was given of the ratification meeting in a reasonable manner under the circumstances. Working under a very short deadline, the union dis-

tributed hand bills at the plant and notified the news media. Several of plaintiffs' affidavits indicate that members did learn about the meeting. Evidence also establishes that the new contract was reported in the local media and that a union member would have been able to determine when the ratification meeting was to be held. Thus, plaintiffs' argument that some of the proposed class members did not know about the meeting until they returned from lay-off is insufficient to toll the statute of limitations regarding the § 411 claim. Furthermore, the affidavit of Donald J. Clift, a named plaintiff in this action, establishes that he knew as of May 2, 1982 that he would not be allowed to vote. Therefore, any cause of action based on § 411 began to run as of that date.

Plaintiffs have moved for leave to file an amended complaint in order to assert a claim under the Fifth Amendment. Plaintiffs allege that they were denied a property right without due process and that there is sufficient government entanglement with the defendants under the national labor statutes to constitute the requisite government action for a Fifth Amendment claim. Plaintiffs contend that the government has transferred its power to the union through the national labor laws.

The Court finds no merit to plaintiffs' argument, and therefore denies leave to amend the complaint. Government regulation is insufficient to convert the actions of private entities into state action if the government is not responsible for or has not compelled the challenged conduct. Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Although the national labor laws authorize a framework for employee organization and collective bargaining, the statutes do not mandate or compel the unions and employers to provide for specific contract provisions. Thus the negotiation of the seniority provisions does not constitute state action. See Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983). The government also has not transferred traditional state functions to the union nor has it acted with the private parties in negotiating the contract. Therefore, there is no state action. Id.

The Union has requested attorney fees and costs expended in opposing plaintiffs' motion to amend pursuant to Fed. R. Civ. P. 11. Defendant argues that the motion is frivolous and cannot be supported by reasonable argument. Plaintiffs have requested that defendant's "reply brief," which requests attorney fees, be suppressed because the brief falls outside the briefing schedule outlined in Local Rule 9.

The Court finds that both requests should be denied. Although plaintiffs' argument in support of their motion to amend is not persuasive, the Court does not find it frivolous and concludes that it does not warrant the imposition of sanctions under Rule 11. Although defendant's reply brief is not within the briefing schedule in Local Rule 9, the Court notes that defendant has requested an extension of time in which to file its reply brief, which plaintiffs did not oppose and which the Court granted. The time to object to defendant's additional brief was at the time defendant requested the extension, not after the brief was filed. Furthermore, plaintiffs are not prejudiced by the reply brief. As plaintiffs point out, it merely sets forth reported case law. Defendant's brief does not attempt to submit additional evidence or insert additional issues into the controversy.

By reason of the foregoing the Court concludes that plaintiffs' claims are barred by the statute of limitations and that defendants are entitled to judgment as a matter of law. The Court also concludes that plaintiffs cannot state a cause of action under the Fifth Amendment and, consequently, their motion for leave to amend the complaint is DENIED. Because this action is being dismissed, plaintiffs' motion for class certification is moot.

THEREFORE, IT IS ORDERED that plaintiffs' motion for leave to amend complaint is DENIED.

IT IS FURTHER ORDERED that defendants' motions for summary judgment are GRANTED.

Dated this 9th day of April, 1985.

/s/ William E. Steckler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD J. CLIFT, et al.	)	
	)	
v.	)	IP 83-1282-C
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.	)	

JUDGMENT

The defendants having moved for summary judgment in this cause, and the Court having determined that there is no genuine issue of material fact, and having issued its order of this date which is as follows:

(H.I.)

IT IS NOW ORDERED, ADJUDGED and DECREED that judgment be entered for defendants International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 3, UAW, and Local 98, UAW, and International Harvester Company, and that plaintiffs take nothing by way of their complaint and that said complaint is DISMISSED.

Dated this 9th day of April, 1985.

/s/ William E. Steckler
United States District Judge